STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2014
v	No. 314249 Wayne Circuit Court
RAYMOND JAVAR WILLIAMS, Defendant-Appellant.	LC No. 12-006132-FH

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of attempting to bribe a witness, MCL 750.122, following a bench trial. Defendant was acquitted of a second charge under the same statute.[1] Defendant was sentenced to 18 months' probation, including 60 hours of community service, for the conviction. We affirm.

I. THE UNDERLYING FACTS AND PROCEDURAL HISTORY

Kahari Wright testified that on September 27, 2011,[2] he witnessed the murder of Darnell Brown in Detroit. Shortly after Wright provided a statement about the homicide to police, defendant called Wright and told him that defendant wanted Wright to make a statement to police that he had seen Brown "running for a gun." On a three-way phone call facilitated by defendant, an offer was made by "Bud"[3] to Wright for the payment of $5,000, after the requested statement was made, and "some more [money] once he beat[s] the case." Defendant acquiesced in the proposal, and also offered to have Wright's cell phone, which had been disconnected,

[1] A charge of obstruction of justice, MCL 750.505, was dismissed for insufficient evidence by the district court following defendant's preliminary examination.

[2] The trial transcript intermittently uses the date September 27, 2012, but it is clear from the preliminary examination testimony and otherwise in the record that the murder occurred on September 27, 2011.

[3] "Bud" is Raymond Williams, Jr., defendant's son, and the person charged with the September 27, 2011, murder of Brown.

reinstated, as part of the incentive for Wright to provide the requested statement. Because Bud was in jail, defendant would make the actual payment to Wright, saying, "once I see the statement made, then I got you," and that he was going to "look out for" Wright.

After first telling police he wanted to "change [his] statement," a fearful Wright quickly told police of defendant's request and plan, explaining how defendant wanted him to, in effect, change his statement by stating that Brown had a gun. Ultimately, Wright did not receive any money from defendant, and he never changed his original statement.

The trial court found defendant guilty of one of the two counts under MCL 750.122, and acquitted him of the other, finding, ". . . what I believe has been proven beyond a reasonable doubt is one of these counts of promising and for helping, and promise to facilitate money in exchange for influencing a person's testimony. I think that's been proven beyond a reasonable doubt. And so, I'm going to find Mr. Williams guilty of one count and not guilty of the other count."

II. ANALYSIS

A. DEFENDANT'S CONVICTION WAS BASED UPON SUFFICIENT EVIDENCE

Defendant first argues that there was insufficient evidence to support defendant's conviction of bribery of a witness under MCL 750.122, because the subsection of the statute was not specified in the felony information, the findings of the trial court were vague, and the trial court failed to articulate its credibility determinations. We disagree.

In criminal cases, due process requires that the evidence must have shown the defendant's guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Challenges to the sufficiency of the evidence in a bench trial are reviewed de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). The Court must determine, in viewing the evidence in the light most favorable to the prosecution, whether the trial court could have found the elements of the crime were proven beyond a reasonable doubt. *Id.* at 474. Findings of fact by the trial court may not be set aside unless they are clearly erroneous. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

The witness intimidation statute, MCL 750.122, "identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). Conduct prohibited by the witness intimidation statute includes "giv[ing], offer[ing] to give or promis[ing] anything of value to an individual" to discourage that individual from attending, testifying or giving information, or to encourage that individual to withhold testimony or testify falsely, at an official proceeding, MCL 750.122(1); and "willfully imped[ing], interfer[ing] with, prevent[ing] or obstruct[ing] or attempt[ing] to willfully impede, interfere with, prevent or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding." MCL 750.122(6). MCL 750.122 punishes both completed and attempted acts of witness interference. *Greene*, 255 Mich App at 440. An attempt consists of two elements: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent

which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (quotation omitted).

The statute itself, MCL 750.122, provides, in parts relevant to this appeal:

> (1) A person shall not *give, offer to give, or promise anything of value* to an individual for any of the following purposes:
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> * * *
>
> (b) *To influence any individual's testimony at a present or future official proceeding*.
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> * * *
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> (6) A person shall not *willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for a present or future official proceeding*. [Emphases added.]

Although the statutory subparts of MCL 750.122 for which defendant was charged were not specified in the information, a comparison of the narrative language of the two counts and the statute reveals that defendant was charged in count I with a violation of MCL 750.122(1)(b), bribery of a witness, and in count II with a violation of MCL 750.122(6), interference with a witness. Count I of the information against defendant alleged that he did "give, offer to give, or promise money and/or for [sic] pay cell phone and/or bill to an individual to influence the individual's testimony at an official proceeding;" Count II alleged that defendant did "willfully impede, interfere with, prevent, or obstruct or attempt to willfully impede, interfere with, prevent, or obstruct the ability of a witness to attend, testify, or provide information in or for an official proceeding." Counsel for defendant acknowledged the two distinct charges in her closing argument, stating, "we believe that these counts, count [one] bribing, intimidating, and count [two] bribing and intimidation and interfering have not been proven beyond a reasonable doubt."

Here, the evidence supports defendant's conviction for a violation of MCL 750.122(1)(b), bribery of a witness. When the trial judge convicted defendant of "one of these counts of promising and for helping, and promise to facilitate money in exchange for influencing a person's testimony," he found defendant guilty of the first of the two counts, count I, bribery of a witness, contrary to MCL 750.122(1)(b), and contemporaneously found defendant "not guilty of the other count," or count II, the alleged violation of MCL 750.122(6), interference with a witness. Wright described defendant's actions in urging Wright to make a specific statement about the Brown homicide to police, testifying that defendant told Wright that he wanted Wright's statement to reflect that Wright had seen Brown "running for a gun," although Wright had not seen Brown running for a gun. Wright further testified that defendant facilitated a three-way call in which an offer was made to Wright for a payment of $5,000 after the requested statement was made and "some more [money] once he beat[s] the case." This testimonial evidence supported the trial court's finding of guilt under MCL 750.122(1)(b), the statutory

prohibition against "offer[ing] to give, or promis[ing] money . . . to an individual to influence the individual's testimony."

Based on the evidence in the record, the court properly found defendant guilty of bribery of a witness, when it found ". . . what I believe has been proven beyond a reasonable doubt is one of these counts of promising and for helping, and promise to facilitate money in exchange for influencing a person's testimony. I think that's been proven beyond a reasonable doubt. And so, I'm going to find Mr. Williams guilty . . . ." A trial court need not make specific findings on every element of the crime; it is sufficient if it appears from the court's findings of fact that the trial court was aware of the factual issues and correctly applied the law. *People v Wardlaw*, 190 Mich App 318, 321; 475 NW2d 387 (1991). A de novo review of the evidence presented, in light of the MCL 750.122(1)(b) statutory language prohibiting an "offer to give, or promise anything of value to an individual . . . to influence any individual's testimony at a present or future official proceeding," in the light most favorable to the prosecution, leads to the logical conclusion that a rational trier of fact could find, based on Wright's testimony, that the elements of the crime were proven beyond a reasonable doubt. *Lanzo Constr Co*, 272 Mich App at 473.

Defendant also challenges the trial court's assessment of the "relative credibility of Wright and defendant," and argues that "the judge never stated he believed Wright more than defendant, nor did he clarify why he found Wright's testimony convincing being beyond a reasonable doubt." This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Conflicts in the evidence are resolved in favor of the prosecution. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). If the resolution of a disputed factual question is contingent on the credibility of the witnesses, this Court will defer to the trial court's superior ability to evaluate matters of credibility. *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000).

The record shows that the trial court's findings of fact were not clearly erroneous. *Robinson*, 475 Mich at 5. Consequently, the statutory elements of the charged offense were proven beyond a reasonable doubt, and there was sufficient evidence to support defendant's conviction for bribery of a witness, contrary to MCL 750.122(1)(b). *Harverson*, 291 Mich App at 175.

B. DEFENDANT WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel was ineffective because she was not prepared to cross-examine Wright and Detroit Police Detective Kevin Nance "intensively," and that, had she been prepared, Wright's credibility would have been reduced, the prosecution would not have met its burden of proof and defendant would have been "exonerated." Again, we disagree.

To preserve a claim of ineffective assistance of counsel, the defendant must move, in the trial court, for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Failure to do so limits this Court's review to errors apparent on the record. *Id.* Defendant did not move for a new trial or seek a *Ginther* hearing in the trial court; therefore, defendant's claim of ineffective assistance of counsel is not preserved for appeal. "Unpreserved issues concerning

ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a mixed question of constitutional law, reviewed de novo, and fact, reviewed for clear error. *Id.* The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 47; 826 NW2d 136 (2012).

Criminal defendants have a right to the effective assistance of counsel under the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish that a defendant's trial counsel was ineffective, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Trakhtenberg*, 493 Mich at 47; *Lockett*, 295 Mich App at 187. A defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Vaughn*, 491 Mich at 670. Moreover, there is a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190. Decisions regarding what evidence to present and on what to focus in closing argument are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). The failure to call or question witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *id.* at 716; *Payne*, 285 Mich App at 190. A substantial defense is one that might have made a difference in the outcome of the trial. *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013).

Wright was the complaining witness and named victim of the two crimes for which defendant was tried. The record shows that Wright was subjected to cross-examination, recross-examination, and re-recross-examination, by defendant's lawyer. During these exchanges, the record shows that defendant's lawyer obtained several concessions helpful to her client's defense, including Wright's admission that he never received any money from defendant, and that it was actually Bud who made the formal offer of the payment of money in exchange for the statement requested of Wright, and that Wright's fear of something happening to him "in the streets" was not based on anything defendant overtly said. The record shows that defense counsel had a presumptively sound strategy to seek to undermine Wright's credibility, thus challenging the prosecution's case and the allegations against defendant. *Vaughn*, 491 Mich at 670. Indeed, the fact that the court acquitted defendant of one of the two charged offenses adds to the presumption that defense counsel's strategy was sound. *Armstrong*, 490 Mich at 291.

It is true that defense counsel chose, as a matter of trial strategy, not to cross-examine Nance. However, the record of the direct examination of Nance by the prosecutor shows the court's frustration with it, when, for example, the court interposed its concern about leading

questions, asking Nance to guess at an answer, and when it made a sarcastic comment. In the face of such judicial skepticism, it was perfectly sound trial strategy for defense counsel to decline the opportunity to cross-examine Nance. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Payne*, 285 Mich App at 190.

In reviewing the constitutional questions de novo, there are no errors apparent on the record. *Lockett*, 295 Mich App at 187. Thus, defendant cannot show that "there is a reasonable probability" that the outcome would have been different in the absence of the allegedly deficient performance, or that confidence in the outcome of the trial was undermined. *Strickland*, 466 US at 694.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood